SUPREME COURT, U.S.
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No. 94-325

In The

Supreme Court of the United States

October Term, 1994

CHANDRIS, INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD.,

Petitioners,

-against-

ANTONIOS LATSIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals commit error, in concluding that Respondent engineer may be considered a seaman under the Jones Act, by following the dictates set out in this Court's latest decisions on point, rather than outdated decisions of another circuit, where the record shows that Petitioners, shipowners, stipulated that Respondent's work contributed to the function of their vessels and assisted in the accomplishment of its mission, and where after he sustained injury at sea, both the Captain and the ship's Doctor declared Respondent to be a member of the crew?

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RESPONDENT'S BRIEF IN OPPOSITION

This brief is respectfully submitted on behalf of the Respondent, a maritime engineer, in opposition to Petitioners' request that a Writ of Certiorari issue to review the decision of United States Court of Appeals for the Second Circuit, dated March 24, 1994. The decision of the court below vacated a judgment of the District Court, and remanded for retrial a case arising under the Jones Act for personal injury, including loss of sight, sustained by Respondent while working aboard Petitioners' ship on voyage to Bermuda from Baltimore, Maryland.

OPINION BELOW

The opinion of the Court of Appeals is reported at 20 F.3d 45 and is reproduced at Appendix A-1, to the Petition. An Order denying the Petition for Rehearing, unreported, is set out at Appendix A-37 to the Petition and the unreported Judgment of the District Court is set out at Appendix A-34 to the Petition.

STATEMENT OF JURISDICTION

The Order of the Court of Appeals denying Petitioners' request for rehearing was issued on March 24, 1994, and the Petition for Writ of Certiorari was filed on August 19, 1994. Jurisdiction of this Court is sought to be invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The Jones Act, 46 U.S.C. §688

"[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . , and in such action, all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."

STATEMENT OF THE CASE

In their Petition for a Writ of Certiorari, rather than presenting the factual background upon which the Court of Appeals considered the applicability of the Jones Act, in conformity with the dictates of Rule 14.1. (G) requiring " . . . a *concise* statement of the case containing facts material to the consideration of the questions presented . . . " Petitioners merely recite a "*P*rocedural *H*istory".

Since this is perceived as the functional equivalent to a misstatement of the facts, the Facts as set forth in the carefully reasoned opinion of the Court of Appeals, are set forth herewith:

I. BACKGROUND

A. Antonios Latsis brought this action under the Jones Act for compensatory damages for personal injuries sustained by Latsis culminating in the loss of sight to his right eye. These injuries allegedly resulted from the negligence of the ship's doctor who failed to treat promptly Latsis' detached retina. Latsis alleges that he sustained these injuries while employed as a "seaman" aboard a cruise ship then known as the S.S. Galileo, one of a fleet of cruise ships owned and operated by appellees Chandris, Inc., Chandris S.A., and Trans Oceanic Shipping Co., Ltd., (hereinafter "Chandris").

The injuries are said to have resulted from medical malpractice by the ship's doctor on May 14, 1989, a Sunday on which the Galileo took on passengers at Baltimore,

Maryland, for a regularly-scheduled, round trip cruise of five days to Bermuda. Around noon of that Sunday, while the vessel was still in port, Latsis, on board and assigned to the Galileo in his capacity as a supervising engineer for Chandris, began experiencing a central visual disturbance which seemed to originate in the bottom portion of his eye. As the day progressed the obstruction to his vision expanded. Latsis did not appreciate the significance of the problem until the time approached to sail in the late afternoon, when he sought medical guidance from an on board nurse who advised him to see the ship's doctor at once. He did so as the ship pulled from the dock in the port of Baltimore. Once in the ship hospital, he consulted Dr. Gonzalez, the physician employed by Chandris for this vessel. Dr. Gonzalez looked at Latsis's eye though an ophthalmoscope and said it appeared to him to be a detached retina. Gonzalez recommended that Latsis relax until he could see an eye specialist when they arrived two days later in Bermuda. Latsis received no further medical care until after the ship arrived in Bermuda, and no attempt was made to transport him ashore for prompt medical care by means of a pilot vessel, helicopter, or otherwise. During this interval, the impairment of his vision continued to intensify until all central vision in the eye was lost.

The malpractice allegations relate to the fact that Dr. Gonzalez, unlicensed in any

state in the United States, neglected to follow the advice of a standard medical textbook which he had on board the vessel which read that " . . . any patient with a suspected or established retinal detachment should be seen on an emergency basis by an ophthalmologist." When the vessel reached Bermuda, a doctor diagnosed his eye as having a massive detachment of the retina. The doctor recommended immediate hospitalization. After a consultation with Latsis's regular eye doctor in New York and another New York eye specialist, the doctors recommended surgical reattachment of the retina. Although Latsis underwent surgery, the end result was that he lost 75 percent of his central vision and can only see light on the sides of his right eye.

At the time Latsis presented himself for treatment in Bermuda, he was given a Chandris form signed by the ship's captain, chief purser, and Dr. Gonzalez, requesting medical attention be provided to Latsis for his "detected [sic, detached] retina" and describing Latsis as a "crew member" holding the "position" of "supt. engineer".

Evidence in the case indicated that Latsis, a naturalized American citizen of Greek ancestry, has had a lifelong involvement with the sea and shipping beginning with his entry into the Merchant Marine as a cadet in Germany following his graduation from high school, his sailing aboard a merchant ship as a second mate following successful completion of his studies and examinations, and finally with his being

appointed captain of a small Mediterranean vessel. Thereafter, he became chief mate on a larger vessel. He came to the United States in 1967 and promptly became a United States citizen. He was employed in San Francisco with a firm of ship surveyors while continuing his education at the University of California at Berkeley. In 1973 he was awarded a Bachelor's Degree of Science and Mechanical Engineering from Berkeley and a year later received a Master's Degree in Naval Architecture, working in the Maritime Industry during this time for the Pacific Marine Association in the ports of San Francisco and Oakland. After graduation he went to New York to work for the American Bureau of Shipping and later for Southern Star Shipping Company as a superintendent and engineer. He supervised Southern Star's vessels' operations and maintenance for 11 years before becoming employed in 1989 by Chandris out of its Miami, Florida office.

Chandris operated a large fleet of merchant vessels, five of which sailed from Atlantic ports in the United States to the Caribbean, Bermuda, and Puerto Rico. For the first three months, Latsis was employed as a consultant and thereafter became a salaried employee. His duties were not confined to any single vessel but ran to the whole fleet. Latsis's duties included not only overseeing the vessels' engineers aboard ship and, hence, involved a number of voyages, but also planning and directing the maintenance at sea from the shore. While he necessarily familiarized himself

with all of the vessels' power plants and engineering functions, he attended several hands-on repairs in a supervising capacity and monitored problems that the ships had or could develop. He was particularly in charge of the electronic equipment, both retrofit and existing equipment.

Latsis's work required him to travel with various ships in the fleet from time to time. The evidence here was conflicting as to how much time he was actually on board ship, Latsis himself testifying that he was on voyages 72 percent of his time and his immediate boss testifying it was more like 10 percent. Latsis maintained his family and residence in Rye, New York, although the company provided him with housing and the use of a rental care in Miami because his office work was regularly there. The vessel on which he was sailing and with which he had more connection than any other vessel in the fleet was the 27-year-old S.S. Galileo, as it was then known, aboard which he had sailed from Miami to Mexico with specialists from Germany to plan for a conversion and upgrading scheduled to take place in Germany in the following year. He helped draw specifications to keep the older ship in repair while sailing on its cruise routes to Mexico and Nassau in the Bahamas. In fact, he had been on board the Galileo at the conclusion of a regular two-day cruise originating from and returning to Baltimore, having joined the ship there on Friday, March 12, two days before the scheduled trip to Bermuda during which his eye injury occurred as above stated. On the Baltimore-

Bermuda trip, Latsis was responsible for escorting various ship-yard personnel around the ship in connection with the upcoming conversion of the vessel. In fact, he was busy with these people after he first noticed the problem with the vision in his right eye at about noon on Sunday, May 14, up until the time of sailing when he finally went to see the ship's nurse who sent him to Dr. Gonzalez.

According to Demetrius Kaparis, who was a senior vice president of Chandris, Inc. and head of its technical department and technical operations before it was taken over by Celebrity Cruises, Inc., Latsis was hired on a regular basis as a superintendent/engineer with the specific work of supervising the electronic systems of their ships and also upgrading the computerized systems and the computerized communication between the ships and the Chandris Miami office. The company had five superintendent/engineers, two in Miami and three in Greece, and all of the engineering department of the ships and masters of the ships reported to Kaparis for technical matters. The Chandris vessels, depending upon size, carried between 12 and 14 licensed engineers on board, and Kaparis supervised six vessels, all passenger cruising ships customarily calling in at New York, Boston, Philadelphia, Baltimore, Charleston, Wilmington, Miami and San Juan. Usually, a vessel would be in home port about every seven days. Occasionally, depending on her itinerary, the ship would return to home port after a 2 or 5 day cruise. Vessels were usually in home port between 9 and 14 hours. Each ship had a superintendent/engineer, completely responsible, who

reported to Kaparis directly. No vessels were assigned to Latsis "because he was taking care of the electronic systems of the ships," in other words, the whole fleet. Latsis reported to Kaparis.

Following Latsis's surgery and recuperation, lasting approximately six weeks, during which he received full pay, he resumed his duties in July, 1989, in Miami, and on September 30 sailed with the Galileo to Bremerhaven, Germany, where the vessel was placed in drydock. The conversion of the vessel was a $65 million job during the course of which the vessel's bottom plates and propeller were removed, the conversion being completed in March, 1990, and the vessel being renamed the Meridian. Latsis, who had been with the vessel the entire time it was in drydock in Bremerhaven, sailed back to the United States aboard the Meridian and continued to work for Chandris until November, 1990, at which time his employment with Chandris terminated. Suit was filed in October, 1991. The district court had subject matter jurisdiction under 28 U.S.C. §1331 (1988), and 46 U.S.C.App. §688 (1988). *Chandris, Inc., Chandris, S.A., and Fourth Transoceanic Shipping Co. Ltd. v. Latsis,* 20 F. 3d 45, 47-49 (2d Cir. 1994).

Following the close of the foregoing evidence, the Petitioners stipulated that the duties performed by Respondent aboard their ships contributed to the function of the vessels and the accomplishment of their mission, or to the operation or maintenance of the vessels during their movement, or while at anchor for the vessels future trips. *Id.* 20 F.3d at 49.

REASON FOR DENYING THE WRIT

The Petition fails to satisfy criteria traditionally applied by the Court in determining whether to grant a writ of certiorari. The court below properly adhered to both the letter and spirit of the Statute (the Jones Act) as most recently construed by this Court in *McDermott Int'l, Inc. v. Wilander,* 498 U.S. 337 (1991) and *Southwest Marine, Inc. v. Gizoni,* 502 U.S. 81 (1991). These authorities are relatively new and the court below obviously was diligently proceeding to conform its ruling to the newly fashioned standards set forth by this Court. Further, the facts in this proceeding are sufficiently unique that their precedential value is likely to be of little value. Finally the Petition presents no broad question of general importance, and on that basis as well, the writ should be denied. *NLRB v. Pittsburgh SS Co.,* 340 U.S. 498, 502 (1951).

The Courts of Appeal for the First and Third Circuits have, likewise, very recently sought to bring their definition of "Seaman" into conformity with this Courts above cited authorities as well. The Third Circuit has acknowledged the decision here sought to be overturned. *Reeves v. Mobile Dredging & Pumping, Co., Inc.,* 26 F.3d 1247 (3d Cir. 1994)[1]; *LeBlanc v. BGT Corp,* 992 F.2d 394, 398 (1st Cir. 1993) (court acknowledged that *Wilander* forecloses a mechanical approach when defining status related issues

[1] In *Reeves,* the court did not adopt the Fifth Circuit's test in *Offshore Co. v. Robison,* 266 F.2d 769 (5th Cir. 1959), but rather, considered the question of seaman status under both pre and post *Wilander* analysis. The court there stated:

under maritime law). Revisiting these issues at this juncture, before other courts have been given the opportunity to evolve their law is, therefore, premature.[2] Moreover, the central theme of this Court's cited pronouncements was to tailor the Seaman's protections to those who regularly confront the hazards of the sea[3]. The court below here, faithfully followed that theme.

THE DECISION OF THE COURT OF APPEALS IS PROPER

The Merchant Marine Act of 1920, more commonly referred to as the Jones Act, was expressly enacted in 1920 by Congress to overrule this Court's 1903 decision in *The Osceola*[4]. The Act removed the previous bar under

> "We acknowledge that our test is somewhat dated, and informed by more recent Supreme Court procedure, we now set forth to modify its course." *Id.* 26 F.3d at 1250.

[2] Petitioners have cited no circuit court decision issued after this Court's decisions in *Wilander* and *Gizoni,* other than the decision of the court below, which takes a definitive position as to the "seaman" test, thus further illustrating that the question raised is premature.

[3] "All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed. See generally Robertson, A New Approach To Determining Seaman Status, 64 Texas L. REV. 79 (1985). It is not the employees particular job that is determinative, but the employee's connection to a vessel." *Wilander,* 498 U.S. at 354.

[4] In *The Osceola,* this Court held that seamen possessed only general maritime rights to maintenance and cure, and that they

general maritime law for an action based upon negligence and afforded a "seaman" the same rights of tort recovery as other victims. *See Wilander, supra, citing* G. Gilmore & C. Black, the Law of Admiralty, 328-329 (2d ed. 1975.). 46 U.S.C. §688 states in pertinent part:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury. . . . , and in such action, all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." (emphasis provided)

Because Congress' enactment of the Jones Act comprised a newly created bundle of rights for seamen, this Court has thus recognized that the statute should be liberally construed by the judiciary to accomplish the beneficent purposes for which it was intended. *Cosmopolitan Shipping Company v. McAllister,* 337 U.S. 783, 790 (1949); *see also Evans v. United Arab Shipping Company, S.A.G.,* 4 F.3d 207 (3d Cir. 1993).

The Jones Act incorporates by reference, legal principles which are applicable under the Federal Employers' Liability Act, (F.E.L.A.), and therefore, a seaman has a right of recovery for the negligence of his employer, its agents or its employees. *DeZon v. American President Lines, Ltd.,* 318 U.S. 660 (1943),[5] *citing Panama Railroad*

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had no legal right to recover against the shipowner for its negligence. *Id.* 189 U.S. at 175.

[5] In *DeZon, supra,* a case substantially similar to the case at bar, Justice Jackson explicitly held that a shipowner is strictly and vicariously liable for the acts of its ship's physician. *Id.* 318 U.S. at 668-669. In the review of the various trades included as

Company v. Johnson, 264 U.S. 375 (1924); *see also The Arizona v. Anelich,* 298 U.S. 110 (1936).

The issue of "seaman" status as it is to be properly defined under the Jones Act has been a most confusing area of maritime law. See Robertson, The Law of Seaman Status Clarified, 23 J. Mar. L. & Com. 1 (1992). This perplexing issue was most recently revisited by this Court in the *Wilander* case. In that case, Justice O'Connor, after undertaking a comprehensive review of the case law which had developed prior and subsequent to the enactment of the Jones Act, came to the conclusion that the determination of an individual's status as a "seaman" is necessarily a mixed question of law and fact. *Wilander, supra,* 498 U.S. at 356. This Court there recognized the two (2) step process which requires the court to initially define the term "seaman" under the appropriate legal standard, and then request the jury to determine whether the proper legal standard has been satisfied by the facts of the case before it. *Id.* 498 U.S. at 356.

The case at bar was the first occasion that the United States Court of Appeals for the Second Circuit had to consider the proper test for "seaman" status following this Court's decisions in *Wilander* and *Gizoni. Latsis, supra,* 20 F.3d at 46.[6]

"seaman" set out in *Wilander,* Justice O'Connor cited with approval historical references dating to the mid-nineteenth century explicitly including engineers. *Id.* 498 U.S. at 343-344.

[6] The question of whether an individual qualifies as a "seaman" under the Jones Act has been articulated in the context of the voyage, since traditionally "seamen" were hired on by ship owners for single voyages. *See Folse v. Weston Atlas International, Inc.,* 593 So.2d 341 (La. 1992).

While this Court in *Wilander* did not explicitly define the extent of the connection that an employee must have with a vessel to be accorded "seaman" status, a "necessary element" was that "a seaman performed the work of a vessel", and that 'an employees duties must contribute to the function of the vessel or to the accomplishment of its mission' captures well an important element of "seaman" status'. *Id.* 498 U.S. at 354. This requirement certainly was complied with here via the Petitioners' stipulation:

> "That plaintiff's capacity and duties performed 'contributed to the function of the vessel or the accomplishment of the vessels' mission or to the operation or maintenance of the vessels during their movements or while at anchor for the vessels' future trips.' " *Latsis, supra,* 20 F.3d at 49.

In many respects, the language of the *Wilander* decision in light of the *Gizoni* holding that the second element, *i.e.*, that the individual's work contributed to the function of the vessel or the accomplishment of its mission, is what is required to be entitled to "seaman" status under the Jones Act. *Folse, supra,* 593 So.2d at 344-45.

Most significantly, and as set forth above, the trial court below, in defining "seaman" status in its instruction, removed pertinent evidentiary facts from the jury's consideration and specifically directed the jury as part of the instruction, that it was not to consider any part of the Respondent's employment aboard the S/S Galileo during the time when it was in dry-dock in Germany. In fashioning this erroneous instruction, the trial judge relied exclusively upon the Ninth Circuit's decision in *McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567 (9th Cir. 1992).

In that case, the Court was faced with an extremely narrow and unrelated issue to the case before the trial court. The Circuit court there was asked only to consider whether the Jones Act applied in the first instance, *i.e.* whether the plaintiff was injured while the ship *was in navigation. McKinley, supra,* 980 F.2d at 569 ("only the first part of the *Wenzel* test needs to be addressed in this case"). There, the plaintiff's decedent was killed in a fire aboard an oil drill ship while the vessel was undergoing an extensive conversion, and had yet to receive a certificate of seaworthiness. The Court held only that because the ship was undergoing a major conversion at the time of the fire, that "the vessel was not in navigation for the purposes of the Jones Act." *Id.* 980 F.2d at 572.

The result of the insertion of this needless hurdle was held by the Court of Appeals to be in contravention of the purposes of the Jones Act and confusing to the jury. *Latsis, supra,* 20 F.3d at 55. It is submitted that once again the Court of Appeals has harmonized the past line of cases with this Court's recent precedent and has thereby achieved the objective of the Congressional purpose in enacting the Jones Act.

Further, to adopt the test set forth by the trial court would lead to results which are inconsistent with the language and intended purpose of the statute. Under the rule proposed below, if a second mate or other crew member were to be injured while at sea three (3) days after embarking upon a voyage which disabled him from further sea duty and resulted in a land reassignment for the following term of his employment, under the rule and rationale set forth below, that same individual would be barred from making a claim under the Jones Act.

By removing from the jury's consideration the six-month period when Respondent worked aboard the vessel seven days-a-week, the trial court again emphasized the temporal relationship as opposed to the intimacy of the employees connection with the vessel directed by *Wilander. Latsis, supra,* 20 F.3d at 55-56.

In sum, the trial court's instruction to the jury concerning Respondent's entitlement to "seaman" status was erroneous and in derogation of a specific purpose and underlying policy of the Jones Act. The remedy provided by the Court of Appeals here furnished both parties with an understandable standard upon which a jury could be cogently instructed and by which a fair determination may be made as to Respondent's eligibility for "seaman" status, and a fair chance for a remedy for the loss of sight occasioned by the neglect of the Petitioners' ship's doctor. Further, the unique factual pattern here is unlikely to provide much precedential value and sufficient time has not passed since the decisions in *Wilander* and *Gizoni* to permit many of the Courts to consider their full import.

CONCLUSION

Accordingly, for all the foregoing reasons, Petitioners' request for a writ of certiorari should be denied.

Dated: September 20, 1994

Respectfully submitted,

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